FILE COPY

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

DALLAS M. PARNELL, Petitioner

v.

THE STATE OF TEXAS, Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND APPENDICES

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner, Dallas M. Parnell, prays that a writ of certiorari be issued to review the judgment of the Court of Criminal Appeals of Texas, entered in the above entitled cause on March 23, 1960, which affirmed his conviction and punishment of ten (10) years in the penitentiary, without evidentiary support of the charges against him.

Opinions Below

The Court of Criminal Appeals of Texas delivered

three majority, and two dissenting, opinions on April 29, 1959, October 14, 1959, and February 24, 1960, respectively, not yet reported. They are reproduced as Appendices I, II, III, IV and V. The record accompanies the petition.

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas is reproduced as Appendix VI.

Three motions for rehearing were filed, all of which were denied: the first, October 14, 1959, with written opinion (App. II); the second, February 24, 1960, with written opinion (App. IV); the third, March 23, 1960, without written opinion. On March 24, 1960, that Court granted a stay of issuance of its mandate and all other proceedings upon the judgment for a period of 90 days therefrom to permit appellant to seek a writ of certiorari from the Supreme Court of the United States. (An extension of time to August 20, 1960, for filing the petition, was granted by Mr. Justice Black, on June 16, 1960.)

The jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1257(3).

Questions Presented

The questions for review are:

(a) Whether "the charges against Petitioner were so totally devoid of evidentiary support as to render his conviction (and punishment) unconstitutional under the Due Process Clause of the Fourteenth Amendment;"

(b) Whether a conviction obtained where

there is a variance between the material allegations of the indictment, under which Petitioner was charged and the evidence adduced upon his trial, is the denial of due process of law under the Fourteenth Amendment; and,

(c) Whether the conviction and punishment of Petiitoner for an offense **not** charged against him is the denial of due process under the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

1. United States Constitution, 14th Amendment, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

2. Penal Code of Texas, Art. 1534:

> "If any officer, agent, clerk, employee or attorney at law or in fact, of any incorporated company or institution, or any clerk, agent, attorney at law or in fact, servant or employee of any private person, copartnership or joint stock association, or any consignee or bailee of money or property, shall embezzle, fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of such principal or employer, any money or property of such principal or employer which may have come into his possession or be under his care by virtue of such office, agency or employment, he shall be punished in the same manner as if he had committed a theft of such money or property."

Statement of the Case

Petitioner was charged by indictment with the embezzlement of "$225,000.00 current money of the United States," belonging to Physicians Life & Accident Insurance Company of America, by virtue of his employment as an officer, agent, servant or employee of said Insurance Company and convicted thereof. (R. 101)

Petitioner sought an instructed verdict because of the insufficiency of the evidence and because of the fatal variance between the material allegations of the indictment and the evidence adduced upon the trial. His motion was denied. (R. 62). The insufficiency of the evidence, the issue of fatal variance, and the conviction of an offense not charged were urged in the State Appellate Court, to no avail.

He is not now in custody, having entered into his recognizance, as required by law. (R. 103-104)

The indictment charged that Petitioner was an agent, officer, servant or employee of Physicians Life and Accident Insurance Company of America; that he embezzled money belonging to said Physicians Life and Accident Insurance Company, to-wit "$225,000.00 in currency of the United States;" that the said $225,000.00 had come into the possession of, and was then under the care of, the said Dallas M. Parnell, by virtue of such employment as said officer, agent, servant or employee of the Physicians Life and Accident Insurance Company of America. (R 6-8)

Petitioner, along with Hamman, McGhee, Valentine and E. H. Owen, (the last named being the State's complaining witness) desired to form (1) an Invest-

mest Company, and (2) an Insurance Company. They entered into a written "Pre-Organizational Agreement" (S F Vol. 1, p. 93, St. Ex. 27). The Investment Company was not to be organized until $315,000.00 in stock had been subscribed. The "Agreement" provided, further, that an Insurance Company would be organized and a Charter secured and, when it was chartered, all of the assets of the Investment Company would be transferred to it and, in exchange therefor, the Investment Company would receive all of the capital stock of said Insurance Company which had been subscribed and paid for by the transfer of such assets. The State's complaining witness, E. H. Owen, signed and agreed to such "Pre-Organizational Agreement." (S F Vol. 1, p. 199)

Thereafter, both Corporations were organized. The Investment Company sold Life Insurance Company stock, as underwriters. From time to time, the **Investment** Company paid the **Insurance** Company for stock, which was then issued to the persons who had purchased it. (S F Vol. 1, p. 81, lines 4-12)

It is uncontradicted, conceded by the State, and set forth in the Opinion (App. I), erroneously affirming this case, that only 50,000 shares of stock had been authorized by the Insurance Company to be sold. This was oversold and oversubscribed by the public.

Early in September Yost and Stuart (officers of the Insurance Company) reported to a group of the Insurance Company stockholders that there was an oversale. Mr. Yost, president of the Life Insurance Company, said it looked like the Company was in trouble and that somebody was going to have to fur-

nish stock from some source to cover the oversubscription. (S F Vol 1, p. 323, lines 9-25). Stuart said the necessity for such was that if the money was returned to the purchasers the Insurance Company would lose 20% commission it was obligated to pay on the sales, which would amount to from $30,000 to $50,000 and, further, since the prospectus covering the last issue carried the notation that further offers would be at a higher price, the Insurance Company could not afford to authorize a new issue to fill the oversales.

Owen, complaining witness, testified that he refused to join the group in the solution suggested for the reason that the stock eventually would be worth more than the price put on the stock that was oversold. Hence, he declined to contribute any of his shares. (S F Vol. 1, page 278, lines 7-17).

To organize the Investment Company, the organizers thereof had executed notes, secured by deeds of trust on real estate, individually, and totalling $225,000.00. These notes and deeds of trust of such organizers were assigned to the Physicians Investment Corporation. Then, Physicians Investment Corporation borrowed $225,000.00 from the Empire State Bank of Dallas, Texas, using the notes as security for the loan. The $225,000.00 borrowed from the Empire State Bank was deposited to the account of Physicians Life and Accident Insurance Company of America as part of its original capital. As soon as the Physicians Life and Accident Insurance Company of America was chartered, with the $225,000.00, public sale of stock in the Life Insurance Company was commenced with the Investment Company acting as underwriter. Subsequently, Physicians Life Insurance Company purchased the $225,000.00 note of the Investment Company from the

Empire State Bank and the notes and deeds of trust securing the Investment Company loan were assigned to the Life Insurance Company. However, as shown by the stipulation entered into between the State of Texas and Petitioner, (S F Vol. 1, pp. 59-62), on July 6, 1955, "Physicians Life Company transferred said note and lien to Physicians Investment Corporation; **that Physicians Life Company received payment from Physicians Investment Company for said note and lien at that time,"** and thereby the Life Insurance Company was **fully** paid.

On July 6, 1955, Physicians Investment Corporation transferred the note and lien of this Petitioner, in the amount of $75,000.00, as collateral, to the loan which it obtained from the First National Bank in Dallas in the amount of $75,000.00.

Up to this point there is absolutely no dispute about the facts. It was conceded that, with respect to the Empire State Bank transactions and the funds borrowed by the Investment Corporation from the Empire State Bank, secured by Petitioner's note and used in the organization of the Life Insurance Company, there is no criminal act, and that the Life Insurance Company, **recovered** its investment in said notes **in full.** (R 822)

Thereafter, the evidence simply shows that the Investment Company gave two checks, one in the amount of $150,383.33 on September 16th, 1955, and one on January 3rd, 1956, for $25,886.11 to the Mercantile National Bank and First National Bank in Dallas, respectively. (S F Vol. 3, p. 51, St. Ex. 18 and S F Vol. 3, p. 51, St. Ex. 20). It will be recalled that the Investment Corporation note to the First National

Bank in Dallas was guaranteed by Petitioner, and was collateralized by Petitioner's note and lien for $75,000.00, against Waco and Dallas property, (S F Vol. 1, p. 298, line 19-23), and that said note and lien were released by the First National Bank in Dallas and the Investment Corporation and returned to Petitioner. (S F Vol. 1, p. 298, lines 1-6).

Apparently, it is the State's theory that Petitioner, and his alleged co-conspirators (none of whom have been tried to date), unlawfully used Life Insurance Company funds, flowing from the sale of its stock, to pay the bank obligations of the Investment Company which were secured by the Individual collateral notes of Petitioner and his alleged co-conspirators. The two checks hereinabove mentioned are supposedly the means by which said embezzlement occurred. It is uncontradicted in the evidence that the two checks mentioned were not drawn against the alleged injured party, to-wit, "Physicians Life & Accident Insurance Company of America," but were drawn on the Investment Corporation bank account by officers of the Investment Corporation. The evidence conclusively established that these funds never came to the Life Insurance Company, were not in the possession of the Life Insurance Company and, therefore, could not be in the possession of Petitioner, in any capacity, as an agent, officer, servant or employee of the Life Insurance Company. The State did not introduce any evidence of bank records, deposit slips or other proof of any probative value that the money, which was used to pay off the obligations of the Investment Corporation (secured by Petitioner's collateral agreement), was ever in the possession of the Life Insurance Company. Had the Petitioner, or any of his alleged co-

conspirators, drawn a check against Life Insurance Company funds and deposited the proceeds into the account of the Investment Corporation, certainly the State would have offered proof thereof. There is absolutely no evidence in this record showing delivery or transfer of these funds by the Investment Corporation to the Life Insurance Company.

The facts are, as stated, that the Investment Corporation was acting as underwriter for the Life Insurance Company in the sale of Life Insurance stock. The State's own witness, Molnar, testified:

> "Q. And from what source did monies received by the Investment Company come?
>
> A. The Investment Company was acting as the agent for the sale of Physicians Life Insurance Company Stock, all monies received by it were from that source.
>
> Q. And what was done with all monies received from the sale of stock by the Physicians Investment Company?
>
> A. From time to time the money was transferred to the Insurance Company." (S F Vol. 1, p. 81, lines 4-12)

Again the State's witness, Molnar, testified:

> "Q. Will you state to the jury whether or not the books of the Life Company show the transfer of funds to the Investment Company to pay off these notes at the bank?" (S F Vol. 1, p. 76, lines 2-4)

The answer is on page 77, S F Vol. 1 (see lines 12-25):

> "A. This particular entry does not show the

transfer of funds. However, it does show an adjusting entry.

Q. All right Sir, will you read that adjusting entry?

A. Dated September 30th, 1955.

Q. September 30th, 1955?

A. Yes, Sir.

Q. Talk a little louder, please.

A. All right. The debit is to surplus from sale of stock in the amount of $175,801.68; the credit is to accounts receivable, Investment Company in the same amount. The explanation given here is: 'Stocks sold by Investment Company for individual stockholders, proceeds of which were erroneously transferred to the Insurance Company (See letters in general voucher file)."

The State's witness, Kernaghan, a Certified Public Accountant, who made the audit, testified on that point, under examination by the District Attorney as follows:

"Q. Tell the jury whether or not that amount, $175,801.68 was on the books of the Life Company prior to its being transferred to the Investment Company; in other words, Sir, at the time this computation was made, the money was on the books of the Life Company and then transferred to the Investment Company?

A. Mr. Alexander, I am slow — I am trying to refresh my memory on that as to how it was recorded on the books of the Life Company. It may have been recorded in an accounts receivable from the Invest-

> ment Company, I have forgotten how it was recorded at that time on the books. What the status of that money was on the books of the Life Company at that time." (S F Vol. 1, p. 170, line 23 through line 10, on p. 171).

Notwithstanding the total absence of evidentiary support of the material allegations of the indictment, the Court of Criminal Appeals of Texas affirmed the case. The motions for re-hearing in that Court specifically raised the points presented in this Petition.

Reasons for Granting the Writ

I.

The Court of Criminal Appeals of Texas erred in affirming this cause because the charges against Petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

It is fundamental that the material allegations of an indictment must be supported by the evidence adduced upon the trial, to sustain a conviction thereunder. 23 Tex. Jur. Sec. 67, p. 681-682. The sufficiency of the evidence to sustain the conviction must be judged with respect to the offense actually alleged in the indictment. (Walker vs. U. S., 104 F 2d, 465).

For the conviction herein to be authorized under the allegations of the indictment, and Article 1534, Penal Code of Texas, supra, **four elements are absolutely necessary to be established, beyond a reasonable doubt,** as follows:

1. That Petitioner, Parnell, was the agent, officer, servant or employee of the Life Insurance Company, as alleged, and, by the terms of his employment, was charged with the duty of receiving the money belonging to the principal;

2. That he did so receive the money belonging to the principal;

3. That he received it in the course of his employment:

4. That he embezzled, misapplied or converted it to his own use, without the consent of his principal or employer. (16 Tex. Jur. Sec. 21, p. 35-36; Fellers v. State 136 SW (2d) 217; Taylor v. State 16 SW 302; Hamer v. State, 131 SW 813).

The Court of Criminal Appeals of Texas has held that if any of the "ingredients" above set out be found wanting, the embezzlement statute does not apply — whether it be felony or misdemeanor — the value of the money or property taken determines that. (Pope v. State 158 SW 527; Brown v. State 11 SW 1022).

Being simply an underwriter for the Insurance Company, as the Investment Corporation received funds from the public from the sale of stock of the Insurance Company, a debtor-creditor relationship was established between the two corporations. The book entries, as between the two corporations, introduced in evidence by the State, show a debtor-creditor relationship between the two corporations. It cannot be said, that money on deposit to the credit of the Investment Company, was money "belonging to" the Insurance Company. Thus, Petitioner was two steps removed

from the money because (1) it was in the bank, and (2) it was on deposit in the name of the Investment Corporation and **not** the Insurance Company.

The book entries show that the Insurance Company owned only an "account receivable" against the Investment Corporation which had no intrinsic value.

The book entries do not show that the funds on deposit in the bank to the credit of the Investment Corporation "belonged to" the Insurance Company; they show exactly the opposite. The Insurance Company could not own the funds, and at the same time own an account receivable; the two are mutually exclusive.

When the Investment Corporation paid the notes at the First National Bank in Dallas and the Mercantile National Bank, the adjusting entry reduced the obligation of the Investment Corporation to pay money to the Insurance Company and, at the same time, reduced the liabilities of the Insurance Company pertaining to its capital structure. This was the mere reduction of a paper asset and a paper liability by an equivalent amount simultaneously.

The adjusting entry was as follows.

"Paid in Surplus $175,801.68

Account Receivable,
Phys. Inv. Corp. $175,801.68

Stock sold by Investment Company for individual stockholders proceeds of which were erroneously transferred to the Insurance Company."

This took no cash from the Insurance Company. The cash account of the Insurance Company was left

undisturbed. It had just as much money immediately after this transaction as it had immediately before the transaction. The only accounts affected were the two, reproduced as "T" accounts below, along with the posted entries:

Assets		Liabilities	
Account Receivable Physicians Inv. Corp.		Paid in Surplus	
Debit Bal.	$175,801.68	$175,801.68	Credit Bal.

Equivalent Entries Reducing Balances.

An account receivable is not money; money is not an account receivable. Reduction of the Insurance Company's account receivable against the Investment Corporation took no money from it.

The indictment **alleges** that Petitioner embezzled money belonging to Physicians Life and Accident Insurance Company of America, in his possession. **The evidence not only does not support this allegation; it expressly disproves it.** The evidence shows that the funds used to pay Petitioner's (Parnell) note came from a bank account of a separate, and entirely distinct, Corporation, to-wit, Physicians Investment Corporation. The Physicians Investment Corporation, being an underwriter for the Insurance Company, as it received funds from the public from the sale of stock of the Insurance Company, a debtor-creditor relationship was established between the two corporations.

The record simply shows that the Investment Corporation had money in its bank account, which said money was used to pay off a note, owed by the Investment Corporation to the bank, which said note was

secured collaterally by the note and deed of trust of Petitioner, originally executed to the Investment Corporation. The record shows nothing further than that the Life Insurance Company had on its book an "account receivable" from the Investment Corporation in an amount in excess of $175,801.68.

By no legitimate construction can the conclusion be drawn from this evidence that Petitioner was the agent, officer, servant or employee of the Life Insurance Company; or that he embezzled $225,000.00 in current money of the United States, belonging to the Life Insurance Company; or that the said $225,000.00 had come into his (Petitioner's) possession and care by virtue of such employment as such agent, officer, servant or employee of the Life Insurance Company.

Note, the indictment specifically charged the embezzlement of "$225,000.00 current money of the United States." This, therefore, being descriptive must be proved as alleged. (Branch, Anno. P. C. of Texas, 3rd Ed. Stout, Vol. 5, Sec. 2807; Stallings v. State 15 SW 716; Lieske v. State 131 SW 1126; Robinson v. State 132 SW 944; Poston v. State 126 SW 1148). Being an allegation of "current money" proof of something different, e.g. an "account receivable," assuming it could be subject to embezzlement, which is denied, is not sufficient. (Miller v. State 53 SW (2d) 790; Scisson v. State 51 SW (2d) 703; Meyers v. State 8 SW (2d) 125).

The principle announced by Mr. Justice Black in **Thompson v. City of Louisville**, 80 S. Ct. 624, 4 L.Ed. 2d 654, to the effect, that charges totally devoid of evidentiary support render a conviction unconstitutional under the Due Process Clause of the Fourteenth

Amendment, is believed to be controlling in the instant case.

Failure to establish the elements required under the allegations of the indictment herein and by Article 1534, supra, render Petitioner's conviction unconstitutional as a denial, to him, of the Due Process Clause of the Fourteenth Amendment.

It is submitted that the evidence: (1) does not establish that Petitioner was the agent, etc., of the Life Insurance Company; (2) does not establish that the money alleged to have been embezzled belonged to the Life Insurance Company; (3) does not establish that Petitioner received the money alleged to have been embezzled in the course of his employment; and (4) does not establish that Petitioner embezzled, misapplied, or converted the money alleged to have been embezzled, without the consent of his principal or employer. Also, the material allegations in the indictment that Petitioner embezzled "$225,000.00 current money of the United States," being descriptive, is not established by proof of something different: It can only be established by proof of the allegation, which absolutely was not done.

Certainly there was no fiduciary relationship of principal and agent shown to exist between the Life Insurance Company and Petitioner, hence, Petitioner was not guilty of embezzlement, as charged, under the laws of Texas. (Bryant v. State, 122 SW 543; Berdell v. State, 220 SW 1101). The Court of Criminal Appeals of Texas thus disregarded its own prior decisions to the prejudice of Petitioner and thereby deprived him of substantial rights, guaranteed by the Due Process Clause of the Fourteenth Amendment.

II.

The Court of Criminal Appeals of Texas erred in affirming this cause because there was a fatal variance between the material allegations of the indictment and the evidence adduced upon the trial, in violation of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Apparently, that Court holds, without supporting authority or justification, that a mere bookkeeping entry satisfies the allegation of the indictment that money was embezzled, whereas, it is a fact that a bookkeeping entry does not change anything — it is simply a record or notation.

The charge that Petitioner took $225,000.00 in currency from the Insurance Company, which was in his possession as an officer, etc. of the Insurance Company, certainly, is not supported by proof that the money was in the Investment Company (not the Insurance Company) and by proof that Petitioner made or caused to be made a bookkeeping entry on the books of the Insurance Company. **The Court of Criminal Appeals concedes that the money was not in the Insurance Company as charged, but in the Investment Company (Op. R 986). Likewise, in the same majority opinion, it is conceded (and correctly so) that the Insurance Company did not have the $225,000.00 it was alleged it had, but that it only had an account receivable, which was not alleged.**

Such is obviously a fatal variance, there being a marked discrepancy between the allegations and the proof.

Prior to the instant case, the Court of Criminal

Appeals of Texas has been consistent in supporting the rule that the facts must correspond with, and support the material allegations of, the indictment and in reversing cases where such variance existed.

In its effort to justify the affirmance of this case, the Court of Criminal Appeals "have but confounded the issues and compounded their errors." (Op. R 988)

III.

The Court of Criminal Appeals of Texas erred in affirming the conviction and punishment of Petitioner for an offense not charged against him, thereby depriving him of due process of law guaranteed by the Fourteenth Amendment of the United States Constittuion.

The summary of the evidence heretofore set out shows that it does not support the material allegations of the indictment, hence, Petitioner's conviction then could only have been for an offense **not** charged. "The conviction is affirmed for the embezzlement of property neither described nor alleged in the indictment." (App. III).

Since the earliest days of the Republic it has been held that a man shall not be charged with one crime and convicted of another, even though the evidence may warrant conviction of such latter offense. (Malaga v. U.S., 57 F (2d) 822).

Chief Justice Marshall laid down the principle in The Hoppett, 11, U. S. 389, 7 Cr. 389, 3 L. Ed. 380, in clear language:

"But a rule so essential to justice and fair pro-

> ceedings as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is the object, . . ."

Continuing, the Chief Justice said:

> "The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.
>
> The reasons for this rule are:
>
> 1st. That the party accused may know against what charge to direct his defense.
>
> 2nd. That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense
>
> These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is therefore a maxim of the civil law that a decree must be secundum alegata as well as secundum probata. It would seem to be a maxim essential to the due administration of justice in all courts."

The arbitrary conviction and punishment of this Petitioner, of an offense not charged against him, denies guaranteed constitutional rights to his prejudice and violates that "fundamental fairness essential to the very concept of justice" as stated by Mr. Justice Rob-

erts in Lisenba v. California, 314 U.S. 219, 186 L. Ed. 166.

This case comes squarely within the rule announced by Mr. Justice Reed, in Lyons v. Oklahoma, 322 U.S. 596, 88 L. Ed. 1481, that "The Fourteenth Amendment is a protection in criminal trials in state courts conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice and in a way that 'necessarily prevents a fair trial,' but does not provide review of mere error in jury verdicts."

Petitioner's complaint is of the fact that he stands convicted of an offense, obviously, **not** charged against him, in violation of law, while "the charges against him were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." **(Thompson v. City of Louisville, 80 S. Ct. 624, L. Ed. (2d) 654).**

Conclusion

The record in this case is quite lengthy — about 1,000 pages — and involved. Petitioner has endeavored to fairly summarize the evidence and, thus, demonstrate the total lack of evidentiary support of the charges; the variance between the material allegations of the indictment and the evidence, and the fact of his conviction for an offense **not** charged against him.

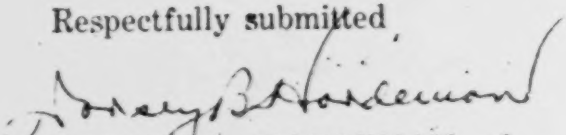
The affirmance of the case presents, for determination, a substantial question relating to the rights of an accused to a constitutional judicial hearing. The action of the Court of Criminal Appeals of Texas is in conflict

with innumerable prior decisions of that Court, as well as with decisions of the Federal Courts on the issues presented in this petition.

Thus, the Court of Criminal Appeals of Texas "has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision." (Rule 19 U.S. Supreme Court, Rev. Rules).

Wherefore, Petitioner prays that the instant petition for a Writ of Certiorari be granted.

Respectfully submitted,



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APPENDIX I

DALLAS M. PARNELL, Appellant

NO. 30,391

THE STATE OF TEXAS, Appellee

Appeal from Dallas County

OPINION

The offense is felony embezzlement; the punishment, ten years.

This is a companion case to that of Hamman v. State, 314 S. W. 2d 301.

The count of the indictment upon which the case was submitted to the jury is in form identical with that set out in the opinion in the Hamann case.

All of the relevant events occured in the year 1955 and early in 1956. Unless otherwise indicated all dates herein mentioned will refer to the year 1955.

For convenience and brevity, Guy B. Hamman, George S. McGhee and James T. Valentine will be referred to as Hamman, McGhee and Valentine, respectively. Collectively they and appellant will be referred to as the "promoters."

Physicians Life and Accident Insurance Company, a corporation, the injured party, will be referred to as the Insurance Company. Physicians Investment Corporation will be called the Investment Corporation.

The case was submitted to the jury as one of circumstantial evidence and a conviction was authorized upon a finding by the jury that appellant acted together with Hamman or McGhee or Valentine or

R. A. Stuart, or all of them.

That part of the law of principals was given in charge which makes all who are guilty of acting together in the commission of an offense guilty as principals.

The evidence from the State's standpoint is in a large measure shown in our opinion in Hamman v. State, supra. Notes secured by deed of trust liens, assigned to the Investment Corporation by the promoters in exchange for original stock of the Insurance Company at $1.00 per share were, according to witnesses for the State, paid with money belonging to the Insurance Company, without the consent of the board of Directors, and released to the makers.

To account for the debit to surplus and credit to the Investment Corporation of the funds to pay off these obligations of the promoters, stock certificate stubs were altered to make it appear that stock sold to the public at $11.00 and $14.20 per share months earlier was stock that had been issued to the promoters and transferred by them.

Additional evidence will be set out in connection with appellant's contentions.

A principal contention of appellant repeatedly asserted in connection with various assignments of error will be first disposed of.

The indictment herein was in three counts. The first alleged theft of $225,000.00 from the Insurance Company and the third count alleged that appellant, together with Hamman, McGhee, Valentine and R. A. Stuart entered into a conspiracy to embezzle $225,000.00 belonging to the Insurance Company.

The second count, alleging the embezzlement, alone having been submitted to the jury, it is contended that appellant was thereby acquitted of conspiring with the other promoters. Accordingly, he argues, all evidence tending to show that appellant conspired with the other promoters to embezzle money from the Insurance Company "passed out of the case for all purposes."

Assuming that appellant stood acquitted of the substantive crime of conspiracy, this did not deprive the State and the jury of the evidence tending to establish the conspiracy, including the acts and declarations of his co-conspirators, in considering the charge of embezzlement in pursuance of the common design or conspiracy. Richards v. State, 53 Tex.Cr.R. 400, 110 S.W. 432; Holt v. State, 39 Tex.Cr.R. 282, 46 S.W. 829; and 9 Tex.Jur., Sec. 14, p. 392 and 393, are deemed authority contrary to appellant's contention.

Appellant contends that there is no evidence to show that he was present when the offense of embezzlement was committed, if it was, and for that reason his conviction as a principal rather than as an accomplice would be set aside.

To decide the question here presented we must first determine where and when the embezzlement occurred.

Dallas M. Parnell, appellant, was Vice-President, Director, Member of the Executive Committee of the Board of Directors and head of the real estate committee of the Insurance Company. He was also President and a Director of the Investment Corporation.

Guy B. Hamman was Secretary, Director and

Member of the Executive Committee of the Insurance Company, and was Vice-President and Secretary and a Director of the Investment Corporation.

George S. McGhee was Treasurer, a Director and Member of the Executive Committee of the Insurance Company and was Treasurer and a Director of the Investment Corporation.

James T. Valentine was Vice-President, a Director and Member of the Executive Committee of the Insurance Company, and was Vice-President and Director of the Investment Corporation.

Collectively appellant, Hamman, McGhee and Valentine constituted majority control and dominated the Executive Committee of the Board of Directors of the Insuracne Company.

The minutes of the meeting of the Executive Committee approving the purchase of appellant's $75,000.00 note do not disclose the fact that it was signed by or represented the obligation of one of the committee. The banker, according to these minutes, appeared and offered the note for sale, describing the security. It may be significant to note that the bank held appellant's note only as collateral.

The same is true as to the notes of the other promoters which were acquired by the Insurance Company. The transaction was between the Insurance Company, represented by the makers of the notes who were officers and directors of the Investment Corporation, and the bank which held the notes as collateral for the Investment Corporation's note.

Be this as it may, the notes were later assigned to the Investment Corporation and paid for, and were

again pledged to secure the payment of bank loans to the Investment Corporation, appellant's to secure a $75,000.00 note to First National Bank, and Hamman, McGhee and Valentine's notes to secure a $150,000.00 note to Mercantile National Bank.

According to its minutes, appellant was present at a meeting of the Executive Committee of the Insurance Company on June 8 when a committee was appointed "to arrange necessary financing to repurchase from the - - - Insurance Company - - - certain loans which had been acquired by the Company from the Empire State Bank." Hamman and McGhee were also appointed on the committee, the fourth committeeman being the then President Yost.

Appellant was present at a stockholders meeting and a meeting of the Executive Committee of the Insurance Company on August 15.

There is no reference to the matter in the minutes of this meeting, however another meeting of the Executive Committee of the Insurance Company was held on September 17, the stated purpose being: "To consider the matter of **the guarantee of the - - - Insurance Company** to the Mercantile National Bank, as per resolution heretofore passed on the 15th day of August, 1955, as to the payment of a note in the sum of $150,000.00 heretofore executed on August 24, 1955, by the Physicians Investment Corporation to said bank."

Resolution was unanimously adopted on September 17 rescinding the action taken on August 15 "in which the - - - **Insurance Company agreed and issued a letter to the Mercantile National Bank guaranteeing that it would purchase the $150,000.00 note of Physicians Investment Corporation, dated August 24,**

1955." Appellant and the other promoters whose notes secured the $150,000.00 loan to the Investment Corporation were present and formed a majority of the Executive Committee.

The minutes of this meeting of September 17 recite that the committee was advised that the Investment Corporation had acquired and had in its treasury a sufficient sum of money to pay off and liquidate the $150,000.00 due and payable to the Mercantile National Bank, and that the Executive Committee of the Insurance Company "felt that said sum should be liquidated."

The Executive Committee further resolved at said meeting that the Investment Corporation "be called upon to immediately pay off and discharge said obligation to the Mercantile National Bank, of Dallas, **so as to relieve the - - - Insurance Company from any obligation in connection therewith,** and that said letter of agreement be surrendered to the - - - Insurance Company."

Following the meeting of the Executive Committee of the Insurance Company at 2 P.M. on September 17, at which the Investment Corporation was called upon to pay off and discharge its obligation to the Mercantile National Bank represented by its $150,000.00 note, the same individuals met as the Board of Directors of the Investment Corporation at 3 P.M. the same day. The promoters constituted the majority at both meetings. R. A. Stuart and E. H. Owen were the only other members of the Executive Committee and the Board of Directors who were present at these meetings.

The minutes of the meeting of the Board of Directors of the Investment Corporation show that the Board

was advised o fthe action of the Executive Committee of the Insurance Company demanding that the $150,000.00 note to be paid, and that resolution was passed that it be paid.

The Investment Corporation, or at least Hamman, its Vice-President, and McGhee, its Treasurer, appear to have anticipated the action that was taken on September 17 for a check had already been issued by the Investment Corporation and delivered the day before, signed by these officers in their official capacity, and $50,000.00 was paid on the $75,000.00 indebtedness to First National Bank. This note was secured by appellant's note and in addition its payment was guaranteed by him.

It will be remembered that the notes of McGhee, Valentine and Hamman, secured by their property, had been assigned to the bank as collateral for the $150,000.00 note, and appellant's note similarly assigned to First National Bank, and that the payment by the Investment Corporation of its indebtedness would entitle that corporation to a return of these collateral notes.

We find, however, that on October 3 Hamman's note and lien were transferred by the bank to the Investment Corporation and on the same day were released to him by the Investment Corporation.

It was well known to appellant and the other promoters that the only fund from which the $150,000.00 note could be paid by the Investment Corporation was the money which had come into its hands from the proceeds of stock sold by it for the Insurance Company. This money belonged to the Insurance Company.

There is evidence tending to show that, from the

beginning, it was the intention of the promoters that their notes, for which they had received shares of stock at $1.00 per share, would be retired by the sale of a part of the stock at a larger sum.

A voting agreement was entered into prior to the execution of the notes in which it was agreed that a certain number of shares would be placed in escrow with the Investment Corporation, to be sold for that purpose at not less than $7.50 per share. Appellant agreed to place 10,667 shares for that purpose.

A second agreement was signed by the promoters in July. This was after sale of stock at $11.00 per share under the 25,000 share offer of May 1 had been oversubscribed and while stock of the Company was being sold under a second prospectus offering an additional 25,000 shares at $14.20 per share was in progress.

In the July agreement appellant and McGhee agreed to deposit in escrow with the Investment Corporation 9,605 shares each; Hamman 6,410 shares and Valentine 3,199 shares. These shares were to be sold for not less than $11.00 per share (except with written consent of all parties); block sales were to be pro-rata; proceeds, less 20% commission, were to be credited to a sum to repurchase by the former owners certain real estate mortgages transferred by the owners in exchange for stock in the Investment Corporation and the Insurance Company, listing the mortgages by name and amount, McGhee and Parnell $75,000.00 each, Hamman $50,000.00 and Valentine $25,000.00.

The Securities Act (Art. 579-1 to 579-42 V.A.C.S.) went into effect September 6. After that date no further stock was or could be lawfully sold by the Investment Corporation for either the Insurance Company or

the promoters unless and until the requirements of the Act were complied with.

Appellant testified that on September 7th or 8th President Yost and Stuart, attorney for the Insurance Company, "reported to a group of us that it looked like we were in trouble, and somebody was going to have to furnish stock from some source" to cover the oversubscription.

An audit began September 19 and final report was made November 2, pursuant to the resolution of the Executive Committee of September 17. The audit was restricted to the capital structure.

During the audit, according to the testimony of Mr. Kernaghan of the auditing firm employed, "somebody asked us to figure out something for them one afternoon - - - it was largely, my recollection, a problem in mathematics to prorate among those five gentlemen a pre-determined figure based on some number of shares that they gave us, as to proportion it between themselves - - - it was a very minor thing at the time. It was just not part of our engagement."

Work sheets and lists were prepared in compliance with the request by the auditors. Hamman directed Mrs. Genevive Watson, his secretary, "to make the transfers as set out on that list." Mrs. Watson then changed the stock certificate stubs shown on the list, totalling 3755 shares, so as to cause it to appear that original stock purchased from the Insurance Company, the net receipts to be "used to embark upon a full scale insurance business" and "to fulfill an expanded business program," was instead transferred from stock certificate No. 288 which had been issued to appellant for 9,605 shares at $1.00 per share.

Certificate stubs of other stock of the Company sold to other members of the investing public were altered in like manner so as to falsely show that the certificate represented stock assigned from Hamman, McGhee, Valentine, R. A. Stuart or appellant.

As a result of these cancellations, falsifications and alterations, $175,801.68 was credited to the Investment Corporation on the books of the Insurance Company as of September 30. **Debit was to Surplus.**

Molnar, the regular auditor of the Insurance Company, then prepared a similar calculation as to the stock necessary to satisfy the remaining mortgages in like manner, appellant's portion being 4583 shares.

On December 14 check for $25,886.00 was issued to First National Bank on the account of the Investment Corporation in said bank. It was signed by Hamman and McGhee, and appellant was asked to deliver it to the bank.

Appellant testified that he objected to his note being paid at that time; that a tax problem was involved, and he declined to deliver it.

On December 28 appellant delivered to Hamman additional certificates issued to him by the Insurance Company endorsed in blank.

Appellant testified that such stock "was to be used as previously discussed with major stockholders, donating a part of their stock back to the company."

The check dated December 14 was delivered to the First National Bank on January 3, 1956, and on the following day appellant received his note and the release of his property mortgaged to secure it.

Appellant's defense was rejected by the jury. The jury was instructed to acquit if they believed or had reasonable doubt: (1) that appellant did not fraudulently intend to misapply, embezzle or convert to his own use money belonging to the Insurance Company; (2) if he did misapply and convert said money but thought he had a legal right to act in the manner in which he did; (3) if he believed that he had a legal right to use and deal with the money alleged to have been embezzled, and so believed that he or they (Hammann, McGhee, Valentine and R. A. Stuart) had said legal right, committed the acts alleged in the second count of the indictment; (4) that appellant was advised by attorneys and employees of the Insurance Company or the Investment Corporation that he had the legal right to apply the money as alleged, and acted upon such advice in good faith believing it to be true.

The entry of $175,801.68 as a debit to surplus and credit to accounts receivable Investment Corporation as of September 30 was explained on the books as "Stock sold by Investment Corporation for individual stockholders, proceeds of which were erroneously transferred to the Insurance Company (See letter in general voucher file)."

The letter referred to was apparently the original of which a copy was offered in evidence setting out the shares which "have been transferred in accordance with our previous conversation" and listing the number of shares of the promoters and of Stuart cancelled, the number transferred and the number re-issued, and the number of such shares which were $11.00 stock (May 1 offer) and $14.20 stock (July 1 offer) respectively.

The mortgage notes of the promoters were releas-

ed to them after the Investment Corporation's notes to the banks were paid. Hamman received his release on October 2 (before the list of the "transfers" to be made was prepared, from which list the $175,801.68 was credited to the Investment Corporation as of September 30). Valentine's note and lien were released, the date not being shown. Appellant received his cancelled note and release of his properties on January 3, 1956. McGhee's note and lien were released on January 13, 1956.

The jury was authorized by the charge of the court to convict upon a finding that appellant embezzled any part of the $225,000.00 of the value of over $50 00 any time within the period of limitation before the return of the indictment.

We conclude that the jury was warranted in finding that the offense of embezzlement was committed as alleged; that the offense was committed in pursuance of a common design and intent and during the existence of such intent and conspiracy, and was not fully consumated until the mortgage notes executed by the conspirators were released to them.

We further conclude that there is sufficient evidence to sustain a finding by the jury that appellant acted as a principal in the embezzlement and misapplication and was present at its commission.

There is no settled mode in which appropriation of money or property of the principal by the officer authorized to receive and handle it must take place. It may occur in numberless ways, and the appropriation consumated in any manner capable of effecting it.

In many classes of cases the question as to what

acts are sufficient to show an appropriation is one of great difficulty.

So long as the person entrusted with the money or property of another acts in accordance with the terms of his trust in reference thereto he is not guilty of embezzlement. He may deposit the money of his principal in the bank in his own name without being guilty of appropriating it. But a withdrawal by him for purposes of his own constitutes appropriation, 16 Tex.Jur. 70; or constitutes evidence of conversion. 16 Tex Jur. 38, 39.

Whether the conversion took place when the deposit was made or at the time of withdrawal is generally immaterial. Stephens v. State, 49 Tex.Cr.R. 489, 93 S.W. 545.

Whether the release by the Investment Corporation of the collateral notes of the officers of the Insurance Company, following the payment of the banks' notes with insurance company funds, established a conversion of such funds by such officers would depend upon their intent. **But the acceptance by these officers of their notes and the release of the securities and property pledged to secure their payment based upon their having been paid with funds of their principal constituted the appropriation of the money to their own use, and was evidence of their fraudulent intent.**

The date of the offense is sometimes of great importance as in conneteion with limitation.

An appropriation piece meal followed by a fabricated note to back up a defense may be considered as one embezzlement or conversion, the time being when the fictitious note was drawn, such act being a clear

manifestation of intent to convert the whole sum entrusted to him. Hamer v. State, 60 Tex.Cr.R. 341, 131 S.W. 813.

People v. Stanford, 106 Pac. 2d 969, is cited in appellant's brief, and points out that in larceny the defendant has obtained possession of his victim's property by wrongful means, and completion of the offense is not dependent upon whether he appropriates the fruits of his theft by a single act or at successive intervals. On the other hand, in the case of embezzlement the property is already in rightful possession of the defendant, and his subsequent fraudulent appropriation is of the essence of the crime.

The record here shows a single impulse to apply money belonging to the corporation to the payment of the obligation of appellant and his confederates. **There were a number of transactions which culminated in the surrender of these obligations to the respective parties.** The embezzlement and the common design was completed by the release of the notes and securities to the debtor, freeing him from the obligation to pay the same. Appellant was present when the payment from money belonging to the Insurance Company was ordered paid, and when his cancelled note and release of lien was delivered to him.

We find no error in the failure of the court to instruct the jury that the State Witness E. H. Owen was an accomplice witness, or to submit the issue to the jury as to whether he was an accomplice.

Owen was present and participated in the meetings of September 17 which authorized and ordered the payment of the $150,000.00 note to Mercantile Bank. He testified that he was present when the sug-

gestion was made that stock which had been issued at $1.00 per share be substituted for stock sold to the public at $11.00 and $14.20 per share. He further testified that he declined to furnish stock for such purpose and stated that it would in effect be stealing. He was not indebted to the Insurance Company or to the Investment Corporation. When he learned that the promoters' notes had been paid and released by the substitution of part of their stock for company-sold stock he reported the matter to the district attorney and to the Insurance Commission.

Appellant assigns as error, for which the judgment should be reversed, the overruling of a number of motions for mistrial based upon the propounding of questions to appellant on cross-examination. In view of the court's instrutcion to the jury to disregard these questions we do not regard the matters as of such prejudicial nature that a mistrial should have been granted.

The judgment is affirmed.

Woodley, Judge.

(Delivered April 29, 1959).

SAME TITLE

APPENDIX II
OPINION
ON MOTION FOR REHEARING

When this case was submitted originally, it received our most careful attention especially because of its complexity. In our opinion we discussed those of appellant's contentions which we deemed controlling. On rehearing we have carefully examined appellant's motion and remain convinced that there is no error which would warrant a reversal.

Accordingly, appellant's motion for rehearing is overruled.

Morrison, Presiding Judge

(Delivered October 14, 1959)

SAME TITLE.

APPENDIX III
DISSENTING OPINION
ON APPELLANT'S MOTION FOR REHEARING

I have concluded that this conviction can not and should not be affirmed under this record. In support of that conclusion, I submit the following:

Here, the indictment upon which this conviction rests charged, in effect, that appellant, as an officer, servant, and employee of the Physicians Life and Accident Insurance Company of America embezzled by converting to his own use "two hundred twenty five thousand dollars in current money of the United States" which belonged to the insurance company and which had come into his possession by reason of his aforesaid fiduciary relation to the insurance company.

There was no allegation in the indictment that appellant acted with any other person or persons in committing the alleged embezzlement.

In keeping with the mandate of Art. 1534, P. C., the trial court instructed the jury that four elements were necessary to establish the crime of embezzling: (See, also, Fellers v. State, 138 Tex. Cr. R. 307, 136 S.W. 2d 217)

> "1. That the defendant was the agent of the person or corporation, as alleged, and by the terms of his employment was charged with the duty of receiving the money of his principal.

"2. That he did so receive the money belonging to his principal.

"3. That he received it in the course of his employment.

"4. That he embezzled, misapplied or converted it to his own use, without the consent of his principal or employer."

The case was also submitted under the law of principals, by the following charge:

". . . All persons are principals who are guilty of acting together in the commission of an offense, and principals, whether jointly indicted or not, may be legally prosecuted and convicted as such **provided the evidence adduced against each clearly and satisfactorily establishes the guilt of each.** Where an offense has been committed, the true criterion for determining who are principals is, 'Did the parties act together in the commission of the offense?' 'Was the act committed in pursuance of a common intent, and in pursuance of a previously formed design in which the minds of all united and concurred?' If so, then the law is that all are alike guilty, provided the offense was actually committed during the existence and in execution of the common design and intent of all, whether in point of fact all were actually bodily present on the ground where the offense actually took place or not . . . ."

In connection with and as a part of that charge, the jury were told, in effect, to convict appellant if they believed that he, alone or "acting together with G. B. Hamman, or George S. McGhee, or James T. Valentine, or R. A. Stuart, or all of them," embezzled as much as $50 in money belonging to the insurance company.

It was under such indictment and charge that appellant was convicted.

I have concluded that the charge upon principals was neither pertinent nor authorized under the allegations contained in the indictment and under the facts in evidence.

While it may be true that, generally speaking, all persons are principals who are guilty of acting together in the commission of a crime, such is not true and can not be true of the crime of embezzlement, which is the offense here charged and for which appellant has been convicted.

The reason for that statement lies in the fact that only members of a certain class can commit the crime of embezzlement. Unless one is within or is a member of that class he can not be guilty of embezzlement.

The class mentioned is comprised of those who bear a fiduciary relation to the injured party, such as an officer, a clerk, an employee, or an attorney at law or in fact of an incorporated company (Art. 1534, P. C.).

The indictment in this case alleged only that the appellant was guilty of the crime of embezzlement, in that he, as an officer, agent, servant, and employee of Physicians Life and Accident Insurance Company of America, embezzled the money of that company. The indictment did not allege that the others, or any of them with whom the appellant was acting, were members of the class that could be guilty of embezzling money of the insurance company.

Notwithstanding such fact, the jury were authorized to convict appellant if he acted with such other

persons in embezzling money from the insurance company. In other words, if the jury believed that Hamman, McGhee, Valentine, and Stuart, or any of them, embezzled as much as $50 from the insurance company and that appellant acted with them or any of them in the commission of that embezzlement he would be guilty.

Such is not the law, and is not a correct legal principle applicable to this case.

The case of Quillin v. State, 79 Tex. Cr. R. 197, 187 S.W. 199, is directly in point. The crime there involved was one which could be committed only by members of a class — that is, by a public officer charged under the law with receiving public funds. The public officer there involved was one Druesedow, Harris County tax collector, whom the indictment alleged embezzled funds of that county which came into his possession by virtue of his office. Quillin was not an officer of the county and was not a member of the class which could commit the offense of embezzlement of county funds. To constitute Quillin a principal to the commission of embezzlement by Druesedow, the indictment contained the additional allegation that he, Quillin, acted with Druesedow in the commission of the offense charged. Quillin's guilt was dependent upon the guilt of Druesedow as the guilty officer.

Upon appeal, Quillin insisted that inasmuch as he was not one of the class to which the offense charged applied he could not be guilty, either alone or as a principal with Druesedow.

The contention was overruled by the court after a lengthy discussion, the court pointing out the following:

> "If the offense in this instance had been murder, arson, rape, or any other felony, it would have been wholly unnecessary to have made any allegation at all about Druesedow. Quillin could have been charged directly with having committed the offense, although Druesedow was merely a principal by reason of what he did or said. It was only because under this particular law Druesedow was in a class who alone could directly commit such a crime that it was necessary to allege what he did at all. Then, after making the necessary allegations which the indictment did as to Druesedow, it was only necessary as to Quillin to allege as it did, that he did unlawfully, willfully, and fraudulently act together with Druesedow in the commission of the said offense; this is the very language of the statute. No other allegation whatever as to what Quillin said or did was necessary."

What the case holds is that (a) one not a member of the class to which the statute applies may be guilty of violating the statute by acting with one who is a member of the class; (b) for a non-member of the class to be guilty of acting with a class member in the commission of a crime the indictment must allege that the non-class member acted with the class member in its commission; and (c) under no circumstance can one be guilty of violating a law applicable only to a class unless it is shown that he was a principal offender and a member of that class or that he acted with the principal offender who was a member of the class to which the statute applies.

As supporting that conclusion, see 12 Tex. Jur., p. 332, 5 A. L. R. 773; 144 A. L. R. 597; and 131 A. L. R. 1322.

In the instant case, then, Hamman, McGhee, Val-

entine, and Stuart, or any of them could not be guilty of acting with appellant in the commission of the embezzlement, there being no allegation in the indictment that said parties acted with appellant in the commission of the crime of embezzlement.

For the same reason and by the same process of reasoning, appellant could not be guilty because he acted with said parties or any of them in the embezzlement. In other words, under this indictment for the offense of embezzlement only appellant, and he alone, could have been convicted for that crime and he could be convicted thereof only upon proof that he committed the crime. He could not be guilty of aiding Hamman; Valentine, McGhee, and Stuart, or any of them, in committing the embezzlement. Such persons were not alleged as occupying a fiduciary relation to the injured company so as to bring them or any of them within the class to which the crime of embezzlement applies.

Such being true, there was no occasion to submit this case upon the law of principals, for that law had no application under the allegations of the indictment. Appellant's guilt under the indictment being restricted to proof that he, himself, committed the embezzlement rendered the charge on principals entirely uncalled for and wholly irrelevant.

The submission of the case upon the law of principals and allowing appellant's conviction thereunder could not have any effect, therefore, other than to injure the rights of the appellant by authorizing his conviction for a crime upon facts which did not constitute such crime under the allegations of the indictment.

The undisputed evidence shows that on May 3,

1955, Hamman, as vice-president, and McGhee, as treasurer of the insurance company, drew a check payable to the Empire State Bank in the sum of $75,383.34 against funds of the insurance company on deposit with said bank.

On May 31, 1955, Yost, as president, and Hamman, as secretary of the insurance company, drew a check payable to the Empire State Bank in the sum of $25,205.55 against the funds of the insurance company on deposit with that bank.

On July 11, 1955, Yost, as president, and Hamman, as secretary of the insurance company, drew a check payable to the investment corporation in the sum of $124,507.88 against the funds of the insurance company on deposit with the Empire State Bank.

On the same day (July 11, 1955), the investment corporation, to which the above check was payable, drew a check through Geo. S. McGhee, as treasurer, by G. B. Hamman, against the funds of the investment corporation on deposit with the Empire State Bank, payable to that bank in the exact amount ($124,507.88) of the above mentioned check.

By these two checks the insurance company transferred to the investment corporation $124,507.88, which amount the investment corporation paid to the Empire State Bank.

Each and every one of the checks drawn against the funds of the insurance company bore the notation that same was in payment of first lien notes and mortgages.

I have expressly referred to the three checks drawn on the funds of the insurance company to demonstrate

that those are the only checks in this record through and by which funds of the insurance company were withdrawn from any bank.

The injury to appellant by the giving of the charge on principals is thus demonstrated, for the jury were authorized to convict appellant if he acted with the drawers of any of those checks in embezzling the funds of the insurance company.

While it is true that appellant did not level an exception to the charge for the reason that the case was erroneously submitted upon the law of principals, yet his exception seeking to have the law of principals applied to the facts and seeking a charge upon the converse thereof is deemed sufficient to call to the trial court's attention the error in submitting the case upon the law of principals.

However, whether a proper exception was or was not reserved to the charge is, in my opinion, wholly immaterial. The authorizing of appellant's conviction upon facts not constituting the offense charged or within the allegations of the indictment was fundamentally erroneous.

In addition to the error discussed, I am convinced that the facts do not show appellant guilty of the crime of embezzlement. First, let it be understood that there is no showing that appellant received and converted to his own use any money belonging to the insurance company. The checks drawn were not payable to him. The money from the checks went to the investment corporation.

The theory upon which this case was tried and the conviction obtained is very clearly and pertinently set

forth in the brief for the state wherein it is said:

> "... appellant and his co-promoters (meaning Hamman, McGhee, and Valentine) caused the Life Company to transfer sufficient funds from the sale of its primary stock to the public to the Physicians Investment Company, which Investment Company used the money to pay off the personal notes of the promoters, including appellant Parnell."

In affirming this conviction the majority opinion adopts an daccepts that theory and states as follows:

> "But the acceptance by these officers (appellant, Hamman, McGhee, and Valentine) of their notes and the release of the securities and property pledged to secure their payment upon their having been paid with funds of their principal constituted the appropriation of the money to their own use, and was evidence of their fraudulent intent."

So it definitely appears that there is no showing and the state appears not to contend that the money of the insurance company on deposit in the bank was in appellant's possession, or that he had received and come into possession of that money for and upon behalf of the insurance company in the course of his employment as an officer, agent, or employee of the insurance company.

To the contrary, the money was in the actual possession of the bank and in the constructive possession of those officers of the insurance company who signed the checks by which the money from the bank was withdrawn, appellant not being one of such officers.

It is apparent, therefore, that appellant is here adjudged to be guilty of the crime of embezzlement

because, as an officer in the insurance company, he permitted the funds of the insurance company to be used to acquire his note from the owner thereof, viz, the investment corporation — and this, under an indictment which charged that appellant converted to his own use money which belonged to the insurance company.

In other words, it is here, in effect, judicially determined and announced as a correct proposition of law that when a corporation purchases an automobile with a check of that corporation signed by its officers and that automobile is thereafter stolen by one of those officers the officer may be prosecuted for and convicted of embezzling or stealing the money with which the automobile was purchased, rather than the embezzlement or theft of the automobile, itself.

To such holding I do not and can not agree.

In the first place, I know of no rule of law more thoroughly established in this state than that which says that to be sufficient to convict the proof must establish the material allegations of the indictment and that unless it does so establish a conviction can not stand. 21A, Tex. Digest, p. 212, Key 171, and authorities there collated.

Under the law, appellant was warranted in assuming that the state would be required to prove and that his guilt or innocence would be made to depend solely and alone upon evidence showing that he embezzled "current money of the United States," which means, according to Art. 1544, P. C., "gold, silver, copper, or other coin, bank bills, government notes, or other circulating medium current as money."

In his charge, the trial court authorized the jury

to convict appellant only if he embezzled or acted with Hamman, McGhee, Valentine, or Stuart in embezzling" . . . any amount of money of the value of fifty dollars or over, belonging to the Physicians Life and Accident Insurance Company of America . . . ."

Where is the evidence which shows that the state discharged the burden assumed by it to prove the embezzlement of money? Where is the evidence which authorized the jury to find that appellant embezzled and converted to his own use any "current money of the United States" belonging to the insurance company?

State's counsel admits and my brethren, in affirming this conviction, agree that appellant's guilt depends solely upon the conversion by him of his own promissory note which was purchased or obtained with funds of the insurance company in the actual possession of the bank upon which the check was drawn.

It is apparent, therefore, that when this conviction is affirmed under these facts, it is no longer the law of this state that the evidence in order to be sufficient to sustain a conviction must establish the material allegations of the indictment.

But the error does not stop there. The conviction is affirmed for the embezzlement of property neither described nor alleged in the indictment.

I had always understood that it was the burden of the state, especially in theft or embezzlement cases, to describe in the indictment the property alleged to have been converted at least sufficiently to identify it and to place the accused on notice of the accusation against him.

However, this is no longer the rule. All that is now necessary is that the indictment allege the embezzlement of some personal property. Under such an allegation the state can then prove the embezzlement of any personal property of any description or character.

This appellant is convicted of embezzling a promissory note which is neither described nor identified in any particular in the indictment.

Yes, the rule no longer exists which says that one accused of crime is entitled to know from the indictment the offense with which he is charged with having commited and to know from the indictment the property he is alleged to have embezzled.

All those matters pale into insignificance, however, when compared to the failure of the indictment to allege the value of the note which was alleged to have been embezzled. The allegation of value of the property stolen or embezzled is jurisdictional and must be stated in the indictment. The penalty ascribed renders the offense of embezzlement either a misdemeanor or a felony. Arts. 1421, P. C., 1422 Vernon's P. C., and 1534 P. C.

Jurisdiction of a trial court over a criminal case embodies the following three essential elements, viz., (1) jurisdiction over the subject matter, (2) jurisdiction over the person, (3) jurisdiction to render the particular judgment which was rendered.

If any one of these jurisdictional elements or factors is lacking, the judgment rendered is fatally defective and void. 12 Tex. Jur., Sec. 111 at page 386.

The indictment in this case conferred jurisdiction on the district court to determine the issue as to appel-

lant's guilt of embezzling money in excess of $50 in value from the insurance company — which was the subject matter to be determined. It did not confer jurisdiction upon the trial court to try and to convict appellant of another and different offense — that is, embezzlement of a promissory note.

Appellant's arrest under that indictment conferred jurisdiction of the trial court over his person to try him for the offense alleged in the indictment.

The first two essential elements — that is, jurisdiction of the subject matter and of the person — were shown in the trial court only to the extent contained in the indictment.

What about the third requisite? The judgment rendered herein was based upon the undisputed evidence which showed that appellant was not guilty of the offense of embezzling money, as charged in the indictment. When the evidence failed to establish that jurisdictional element, the trial court lost jurisdiction to render any judgment other than one finding appellant not guilty.

Jurisdictional authority did not exist which would authorize the adjudication of appellant as guilty of some other offense or of the embezzlement of property not described in the indictment.

There being no allegation in the indictment that the note alleged to have been embezzled was of a value of $50 or over, the district court did not have jurisdiction to render the judgment which was here rendered adjudicating appellant guilty of embezzling a note of the value in excess of $50, a felony.

I now call attention to the rule of law which I

pointed out in my dissenting opinion in the case of Cage v. State, Tex. Cr. R., 320 S.W. 2d 364, as to the distinction between the crime of embezzlement and that of theft, wherein I quoted from 18 Am. Jur., Embezzlement, Sec. 12, p. 577, as follows:

> " 'The principle is well established that an essential element of embezzlement is the conversion of the property lawfully in the possession of the accused. If the property is in the actual or constructive possession of the owner, the offense is larceny . . . Generally, it may be said that mere custody of property as distinguished from possession does not suffice to support an accusation of embezzlement . . . The reason for this rule is that if a person gains possession of property so as to constitute only a bare charge or custody, such custody does not divest the possession from the true owner and the appropriation of the property under such circumstances amounts to larceny, and not embezzlement.' "

Such rule is applicable here. The note which appellant was alleged to have stolen was in the constructive possession of the insurance company after its funds had gone into the purchase of the note. If appellant obtained the note, he obtained only the custody thereof without divesting the insurance company of its ownership as well as possession of the note, and the offense he committed thereby was that of plain theft of the note.

The value of the note rested in the obligation of appellant to pay and in the securities guaranteeing the performance of that obligation. Mere possession of the note by appellant did not destroy that obligation or its value. The insurance company owned the note and the obligation. Appellant's acquisition thereof did not de-

stroy the note or the obligation.

In this connection, I call attention to the fact that in theft cases it is only necessary that the thief take the property with intent to appropriate it to his own use and benefit. Art. 1410, P. C.

Such is not true of the crime of embezzlement. To be guilty of that crime the embezzler must actually embezzle and convert to his own use the property embezzled.

In conclusion, absolute candor impels me to admit that when I agreed to the affirmance of this conviction originally I did not understand or recognize in this record the errors which I have here pointed out.

Being now convinced that this conviction should not be permitted to stand because of the reasons set forth, I should not hesitate to say so.

I respectfully dissent.

Davidson, Judge

(Delivered October 14, 1959)

SAME TITLE

APPENDIX IV
OPINION
ON SECOND MOTION FOR REHEARING

Appellant forcefully challenges the conclusion in our original opinion that the money which was embezzled **belonged** to the insurance company and again calls our attention to the fact that the checks which were used to pay off the promoters' notes were drawn on the investment company and not the insurance company. The answer to such contention lies in the entry made in the insurance company books which showed that the insurance company had transferred on its

books the sum of $175,801.68 to the investment company with the notation, "Stock sold by investment company for individual stockholders, proceeds of which were erroneously transferred to insurance company." Whether or not the funds had been "erroneously transferred to the insurance company" is not the question. It was the act of making this entry that took money from the insurance company and placed it in the investment company, where it was used to pay off the notes, that made the embezzlement here charged possible.

We have again carefully considered the entire record and cannot bring ourselves to agree with appellant's contention that no crime has been shown or that it would be impossible for a majority of the officers and directors to embezzle corporate funds merely because they constituted such a majority.

Remaining convinced that we properly disposed of this cause originally, appellant's second motion for rehearing is overruled.

Morrison, Presiding Judge

(Delivered February 24, 1960)

SAME TITLE

APPENDIX V
DISSENTING OPINION
ON SECOND MOTION FOR REHEARING

It occurs to me that in endeavoring to justify the affirmance of this case my brethren have but confounded the issues and compounded their error. They now justify the affirmance of this conviction by saying that:

> "It was the act of making this entry that took money from the insurance company and

placed it in the investment company where it was used to pay off the notes that made the embezzlement here charged possible."

So there now appears to be an admission that the funds, if any, used to pay off appellant's notes belonged to and were in the possession of the investment company, and in no event were such funds the property of the insurance company or in its possession at the time.

The book entries took no cash from the insurance company. The cash account of that company was not disturbed. The company had just as much money immediately after the transaction as it had immediately before.

All the insurance company had or was entitled to was an account receivable from the investment company.

This was not money. No checks were drawn on or paid by the insurance company. All the entry represented was a bookkeeping transaction, with a simultaneous reduction of a paper asset and a paper liability by the equivalent amount.

The state charged this man with embezzling money. It is for that offense that he has been convicted. It is for embezzling money of the insurance company that he goes to the penitentiary.

The evidence does not show or warrant his conviction for that offense.

Mere bookkeeping entries are not money.

I dissent.

Davidson, Judge

(Delivered February 24, 1960)

APPENDIX VI

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 30, 391, styled,

DALLAS M. PARNELL, Appellant,

vs.

THE STATE OF TEXAS, Appellee,

judgment of the Criminal District Court No. 3 of Dallas County, Texas, was affirmed by this Court on April 29, 1959; Appellant's Motion for Rehearing overruled October 14, 1959; Appellant's Second Motion for Rehearing overruled February 24, 1960; Appellant's Third Motion for Rehearing overruled, without written opinion, March 23, 1960, and order staying mandate and all other proceedings, to permit appellant to seek a writ of certiorari from the Supreme Court of the United States, was issued and filed March 24, 1960.

THEREFORE, with the overruling of Appellant's Third Motion for Rehearing, this cause was disposed of by this Court on March 23, 1960, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas in criminal cases, and said judgment has now become

final on the docket of this Court and mandate would have issued had not same been stayed on motion of appellant to permit application for writ of certiorari.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 2nd day of May, A.D. 1960.

s Glenn Haynes

Glenn Haynes

Clerk, Court of Criminal Appeals
of Texas